

154 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Central Hudson Gas & Electric Corporation	Docket Nos. ER10-2805-005
Tucson Electric Power Company	ER10-2564-006
UNS Electric, Inc.	ER10-2600-006
UniSource Energy Development Company	ER10-2289-006
Central Hudson Gas & Electric Co.	EL16-37-000

ORDER ON UPDATED MARKET POWER ANALYSIS, INSTITUTING SECTION
206 PROCEEDING, AND ESTABLISHING REFUND EFFECTIVE DATE

(Issued February 22, 2016)

1. On December 31, 2015, Central Hudson Gas & Electric Corporation, Tucson Electric Power Company, UNS Electric, Inc. and UniSource Energy Development Company (collectively, Applicants) filed a triennial market power update for the Southwest region in compliance with the regional reporting schedule adopted in Order No. 697.¹ The triennial includes an updated market power analysis for the

¹ See *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

Tucson Electric balancing authority area and first-tier balancing authority areas.² Applicants represent that they pass the pivotal supplier and wholesale market share indicative screens in the first-tier balancing authority areas, but fail the wholesale market share indicative screen in the Tucson Electric balancing authority area. Such failure establishes a rebuttable presumption of horizontal market power and the basis for instituting a proceeding pursuant to section 206 of the Federal Power Act (FPA)³ to determine whether Applicants' market-based rate authority in the Tucson Electric balancing authority area remains just and reasonable and to establish a refund effective date.⁴

2. Although Applicants submit a delivered price test analysis to rebut the presumption of horizontal market power in the Tucson Electric balancing authority area, we conclude that Applicants' failure of the wholesale market share screen provides the basis for the Commission to institute the instant section 206 proceeding in Docket No. EL16-37-000. The instant section 206 proceeding is to determine whether Applicants may continue to charge market-based rates in the Tucson Electric balancing authority area and to establish a refund effective date for the protection of customers⁵ while the Commission evaluates the filed delivered price test analysis. As the Commission has previously stated, sellers submitting evidence, such as a delivered price test, in support of a contention that they do not possess market power, should not expect that the Commission will postpone instituting a section 206 investigation while it

² The first-tier balancing authority areas are the Arizona Public Service Company, El Paso Electric Company, Public Service Company of New Mexico, Salt River Project, Western Area Power Administration – Colorado Missouri, and Western Area Power Administration – Lower Colorado balancing authority areas.

³ 16 U.S.C. § 824e (2012).

⁴ The section 206 investigation will extend to any affiliate of Applicants with market-based rate authorization.

⁵ *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 78, *clarified*, 121 FERC ¶ 61,260, at P 12.c (2007) (Clarification Order), *order on reh'g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at PP 124-313 *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh'g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh'g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

examines the supplemental information.⁶ Consistent with Order No. 697,⁷ the Commission may institute section 206 proceedings in instances where there are pivotal supplier or wholesale market share indicative screen failures prior to completing its review of any supplemental information, such as a delivered price test, in order to establish refund protection while the Commission analyzes such supplemental information.⁸

3. Under the section 206 proceeding established herein, Applicants must show cause, within 60 days of the date of issuance of this order, as to why the Commission should not revoke their market-based rate authority in the Tucson Electric balancing authority area. In addition to the previously-filed delivered price test, Applicants may present alternative evidence such as historical sales and transmission data to rebut the presumption that they have the ability to exercise horizontal market power in the Tucson Electric balancing authority area.⁹ In the alternative, Applicants may (1) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (2) inform the Commission that they will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

4. In cases where, as here, the Commission institutes a section 206 proceeding on its own motion, section 206(b) requires that the Commission establish a refund effective date that is statutorily-limited to "no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date."¹⁰ In such cases, in order to give maximum

⁶ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75 & n.59 (citing *LG&E Energy Mktg. Inc.*, 111 FERC ¶ 61,153, at PP 21, 22 (2005); *Tampa Electric Co.*, 110 FERC ¶ 61,206, at PP 24, 25 (2005); *Entergy Servs., Inc.*, 109 FERC ¶ 61,282, at P 36 (2004)).

⁷ In Order No. 697, the Commission noted that sellers may present alternative evidence, such as a delivered price test study, to rebut the results of the indicative screens, but that "sellers should not expect that the Commission will postpone initiating a section 206 investigation to protect customers while it examines this supplemental information if screen failures are indicated." Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 75.

⁸ See, e.g., *Nevada Power Co.*, 149 FERC ¶ 61,219 (2014); *Arizona Public Serv. Co.*, 149 FERC ¶ 61,013 (2014); *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013).

⁹ Order No. 697, FERC Stats. & Regs. ¶ 31,252 at P 117.

¹⁰ 16 U.S.C. § 824e(b) (2012).

protection to customers, and consistent with precedent, the Commission has historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we will do so here as well.¹¹ That date is the date of publication of notice of initiation of this proceeding in the *Federal Register*.

5. In addition, section 206 requires that, if no final decision has been rendered by the 180-day period commencing upon institution of a proceeding pursuant to this section, the Commission shall state the reasons why it failed to do so and shall state its best estimate as to when it reasonably expects to make such a decision. We expect that we should be able to render a decision by October 31, 2016.

The Commission orders:

(A) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R., Chapter I), the Commission hereby institutes a proceeding in Docket No. EL16-37-000, concerning the justness and reasonableness of Applicants' market-based rates in the Tucson Electric balancing authority area as discussed in the body of this order.

(B) For the Tucson Electric balancing authority area, Applicants are directed, within 60 days from the date of issuance of this order to (1) show cause as to why the Commission should not revoke their market-based rate authority; (2) file a mitigation proposal tailored to their particular circumstances that would eliminate the ability to exercise market power; or (3) inform the Commission that they will adopt the Commission's default cost-based rates or propose other cost-based rates and submit cost support for such rates.

(C) Any interested persons desiring to be heard in Docket No. EL16-37-000 should file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.214) within 30 days of the date of this order.

¹¹ See, e.g., *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

(D) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL16-37-000.

(E) The refund effective date in Docket No. EL16-37-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (D) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.